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October 17, 2002

## VIA FEDERAL EXPRESS

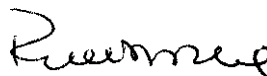
Commission's Secretary  
Office of the Secretary  
Federal Communications Commission  
9300 East Hampton Drive  
Capital Heights, MD 20743

Re: CC Docket No. 01-92

Dear Secretary:

Enclosed is an original and five copies of the Comments of the Nebraska Rural Independent Companies for filing in the above-referenced docket. Please return a file-stamped copy to the undersigned in the enclosed self-addressed, stamped envelope.

Very truly yours,



Kelly R. Dahl  
FOR THE FIRM

KRD/eam  
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Enclosures

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Commission's Secretary  
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**COMMENTS OF  
THE NEBRASKA RURAL INDEPENDENT COMPANIES**

The Nebraska Rural Independent Companies’ (the “Nebraska Companies”) respectfully submit their comments in the above captioned proceeding seeking comment on petitions for declaratory ruling regarding intercarrier compensation for wireless traffic. The Nebraska Companies will address the Petition for Declaratory Ruling (the “Petition”)<sup>2</sup> filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc. (the “CMRS Petitioners”). The CMRS Petitioners request the Federal Communications Commission (the “Commission”) to direct incumbent local exchange carriers (“ILECs”) to withdraw any wireless termination tariffs in existence today, or alternatively, to declare such tariffs unlawful, void and of no effect. The Nebraska Companies, which have participated in a proceeding addressing

<sup>2</sup> See *Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs*, CC Docket No. 01-92, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Petition for Declaratory Ruling* (“*Petition*”) filed September 6, 2002.

questions concerning wireless termination tariffs in Nebraska, assert that the information contained in the Petition misconstrues the nature and purpose of wireless termination tariffs filed by ILECs. As the Nebraska Companies will explain more fully in these comments, the filing of wireless termination tariffs is not a means to receive reciprocal compensation while not compensating CMRS carriers, nor is it a means to evade the duty to negotiate an interconnection agreement with a CMRS carrier—as is wrongly asserted by the CMRS petitioners. Instead, wireless termination tariffs are a means to receive compensation absent either an interconnection agreement or the authority to compel CMRS carriers into negotiations to achieve such an agreement. Since the state wireless termination tariffs are not a means to bypass the negotiation process, the Commission should not declare such tariffs unlawful, as requested by the CMRS Petitioners, nor should the Commission direct ILECs to withdraw any such tariffs that are in existence today.

## **II. The Language Of The Act And The Commission’s Interpretation Of The Act Limits ILECs To Receiving Requests To Negotiate With CMRS Providers.**

In their Petition, the CMRS Petitioners state that some small ILECs want to receive reciprocal compensation and that the CMRS Petitioners are willing to negotiate an interconnection agreement upon request. According to the petitioners, the small ILECs bypassed the negotiation process mandated by the Communications Act of 1996 (“the Act”) and instead filed wireless terminations tariffs.<sup>3</sup> This is simply wrong.

The Nebraska Companies filed tariffs because the language of Section 252(a) of the Act, as well as the Commission’s interpretation of Sections 251(b) and 251(c) of the Act, limits ILECs’ ability to establish reciprocal compensation agreements with wireless

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<sup>3</sup> Id at p. 4

carriers. Section 252(a) states that the incumbent local exchange carrier, upon receiving a request for interconnection, services, or network elements pursuant to Section 251, may negotiate and enter into a binding agreement with the requesting telecommunications carrier with regard to the standards set forth in subsections (b) and (c) of Section 251.

Although ILECs are obligated under the Act to establish reciprocal compensation agreements, given the language under Section 252(a), ILECs can only take advantage of this statutory provision, if requested. Since CMRS providers are not ILECs under the Act, CMRS providers do not have a duty to establish reciprocal compensation arrangements nor have an obligation in Section 252(a) to respond to requests for negotiations from LECs. The Commission, in CC Docket No. 96-98, has stated that since CMRS providers are not LECs, they are not subject to the obligations of Section 251(b) of the Act.<sup>4</sup> And since CMRS providers are not incumbent LECs, they are not subject to the duties and obligations imposed under section 251(c) of the Act.’ Thus, according to the Commission’s interpretation of the Act, CMRS providers are not obligated to establish reciprocal compensation arrangements nor do they have a duty to negotiate until they have requested negotiations with an ILEC.

Given CMRS providers are terminating their traffic onto the Nebraska Companies’ networks for free through the use of indirect trunk groups from third party tandem providers such as Qwest Communications and ALLTEL, it has been the experience of rural ILECs in Nebraska that there is nothing to compel CMRS providers

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<sup>4</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996) (“*Local Competition Order*”) at paragraph 1005.

<sup>5</sup> Id. at paragraph 1006.

into negotiations. Only when the CMRS provider desires a direct connection with a company has there been an incentive for the CMRS provider to request negotiations with the LEC, since the LEC is not obligated to establish the connection without an agreement. And those instances have been the exception, not the rule.

Interconnection agreements have been reached between CMRS providers and tandem providers for compensation of transport, termination, and transiting of wireless traffic. However, the Nebraska Companies were not a party to those contracts, nor were they approached to be a party during negotiations, nor did they receive an offer to be a party to a negotiated agreement. While the agreements specified payment to the tandem provider for transiting traffic to the third party Nebraska Companies, the agreements provide no recourse for the Nebraska Companies in receiving compensation for terminating such traffic.

The Nebraska Companies have been required to involuntarily terminate wireless traffic onto their networks without compensation for such services. Upon the Nebraska Public Service Commission's ("NPSC") approval of the Nebraska Companies' Wireless Termination Service Tariffs, a decision which is pending, the Nebraska Companies would finally have the explicit authority to be appropriately compensated by CMRS providers in a competitively neutral manner.

**111. The Act Contains No Provision Prohibiting The Filing Of A Wireless Terminating Tariff And Nebraska Law Specifically Empowers The Nebraska Commission To Approve Such A Tariff.**

The CMRS Petitioners ask the Commission to declare that the wireless termination tariffs are unlawful.<sup>6</sup> The Nebraska Companies believe there is no basis in federal or state law for such a determination.

The Act contains no provision prohibiting the filing of a wireless terminating tariff. Nowhere in Sections 251 and 252 of the Act does Congress prohibit the terms of interconnection pursuant to tariffs absent a request to the ILEC from a telecommunications company exercising its rights pursuant to Section 252 of the Act. It is apparent from the plain language of the Act that reciprocal compensation arrangements are mandatory features of agreements between CMRS Carriers and rural LECs. However, the record in Nebraska shows that at present there are no such agreements between the CMRS Carriers and the Nebraska Companies. Therefore, the Act does not preclude recovering compensation via a tariff.

While the Act does not prohibit the approval of a wireless terminating tariff, Nebraska law specifically provides the NPSC with the authority to adopt a tariff in this circumstance. The Nebraska Companies filed tariffs with the NPSC pursuant to Section 86-803(4) of Nebraska Statute. Section 86-803(4) states that a telecommunications company may at any time file an application with the Commission requesting the Commission to prescribe fair, just, and reasonable rates. The Nebraska Companies' application is clearly within their legal rights under Nebraska Statute.

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<sup>6</sup> See *Petition* at p. 7.

The Nebraska Companies have a constitutional right to be compensated at fair, just, and reasonable rates for their services. *See Duquesne Light Co. v. Barash*, 488 U.S. 299,307 (1989). The NPSC clearly has authority to approve the proposed tariffs to assure that the Nebraska Companies receive compensation for their services.

**IV. The Commission's Pricing Standards Are Applicable To Agreements Negotiated Pursuant To The Act And Do Not Apply To Tariffs.**

The CMRS Petitioners state that Commission rules require that transport and call termination rates be set using TELRIC methodology. According to the CMRS Petitioners, it is unlikely that the prices contained in the tariff are consistent with the costing/pricing standards set forth in the Act and the Commission's implementation rules governing interconnection and reciprocal compensation'.

The pricing standards contained in the Act, which the Commission's pricing regulations interpret and implement, provide guidance to state commissions in the arbitration of interconnection agreements. The pricing standards are, by their very terms, for the purpose of compliance with section 251(b)(5). Since there are no agreements between the Nebraska Companies and the CMRS Petitioners approved by the NPSC, there isn't an agreement to which Section 252 pricing standards can be applied. Since Section 251(b)(5) does not apply to tariffs, the same conclusion necessarily governs application of the pricing standards relative to Section 251(b)(5) obligations that are contained in Section 252(d)(2): Section 252 pricing standards don't apply to tariffs.

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*'See Petition at p. 6*



**V. The CMRS Petitioners' Assertion That The Tariffs Are Unlawful And Preempt Their Rights To Negotiate Are Intentionally Misleading.**

The CMRS Petitioners allege that small ILECs are preempting interconnection negotiations by unilaterally filing state interconnection tariffs.<sup>8</sup> In this regard, the CMRS Petitioners cite Commission rulings that disallow the use of tariffs if the purpose of such tariffs is to avoid or override negotiated agreements. However, as stated earlier, this is not the purpose of the wireless termination tariffs filed by the Nebraska Companies. As such, the assertions made by the CMRS Petitioners, as well as the Commission orders cited, are not applicable in this situation.

The CMRS Petitioners assert that the filing of a tariff is at odds with the negotiation process adopted in the Act. The CMRS Petitioners cite a Commission ruling which states that “[u]sing the tariff process to circumvent the section 251 and 252 processes cannot be allowed.”<sup>9</sup> However, the quote was associated with the Commission's concern that a carrier was attempting to use a tariff to override any interconnection agreement, not that a tariff was filed in the absence of an interconnection agreement.<sup>10</sup> Furthermore, the Commission noted that the tariff, which was a federal tariff, would be governing compensation for local traffic, which might conflict with interconnection agreements approved by state commissions.<sup>11</sup> This concern is not applicable to the wireless termination tariffs, as they are being filed with state

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<sup>8</sup> id. at p. 8.

<sup>9</sup> Id. at p. 9.

<sup>10</sup> *See Bell Atlantic, Delaware, Inc., et al. Complainants, v. Global NAPs, Inc., Defendant*, File No. E-99-22, Memorandum Opinion and Order, (rei. Dec. 2, 1999) at para. 23.

<sup>11</sup> Ibid.

commissions, not with the Federal Communications Commission. Finally, the CMRS Petitioners state that “. . . the Commission held that an ILEC may not avoid the rates contained in an interconnection contract simply by filing a tariff containing higher rates.”<sup>12</sup> The purpose of wireless termination tariffs is not to avoid a rate contained in an interconnection contract as discussed below. Therefore, this Commission ruling also has no relevance to the appropriateness of filing wireless termination tariffs to receive compensation in the absence of an interconnection agreement.

The CMRS Petitioners fail to note the express provision in the Nebraska Companies’ tariffs, which states that the tariff applies except as otherwise provided in an interconnection agreement between a CMRS provider and the telephone company approved by the NPSC pursuant to the Act. For the CMRS Petitioners to allege that the Nebraska Companies’ tariffs preempt interconnection negotiations, when this express provision clearly indicates otherwise, is false and intentionally misleading.

**VI. The Iowa Utilities Board’s Decision Mandates Compensation For Transport Services, While Its Decision To Implement Bill and Keep For Termination Cost Is Irrelevant In Nebraska.**

The CMRS Petitioners cite an Iowa Utilities Board (the “IUB”) decision adopting a bill and keep form of reciprocal compensation as a means to address the wireless termination service tariffs.<sup>13</sup> Closer review of the IUB’s decision, however, reveals that the IUB mandated compensation for transport while ordering a bill and keep regime for termination based upon an earlier established IUB rule.

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<sup>12</sup> *Petition* at p. 9.

<sup>13</sup> *Id.* at p. 5.

The IUB ruled that the wireless carriers are entitled to interconnect to the Iowa companies through a direct connection.<sup>14</sup> The Nebraska Companies' tariffs do not apply to direct connections, but apply to indirect connections. The IUB ruled that if wireless carriers want to use the facilities of Iowa Network Services for an indirect connection, they may do so, but Iowa Network Services is entitled to compensation for providing those services." Thus, the IUB has required the wireless carriers to compensate Iowa Network Services for the transport of indirect connections. In Nebraska, the Nebraska Companies are responsible for transport of traffic involving indirect connections and therefore should be compensated for transport in a manner similar to Iowa Network Services.

The IUB's decision regarding bill and keep for termination costs was based upon the Iowa Utilities Board's rules that were in effect governing compensation arrangements between LECs in the state of Iowa. The IUB rules require that traffic be exchanged on a bill and keep basis at least until such time as a continuing and significant traffic imbalance has been shown. The IUB has a specific rule regarding bill and keep which it referenced as the reason for applying bill and keep for wireline to wireless interconnection.<sup>16</sup> 199 IAC 38.6(1) reads as follows: "Until the board approves monetary compensation and until tariffs for the compensation are in effect, each local utility shall terminate local and extended area service calls on a mutual exchange of traffic basis, at no charge to the originating provider." There is no such rule in Nebraska and in fact

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<sup>14</sup> See *IN RE: Exchange of Transit Traffic*, State of Iowa Department of Commerce Utilities Board, Docket No. SPU-00-7 TF-00-275, Proposed Decision and Order, November 26, 2001, at p. 40.

<sup>15</sup> Id. at p. 41

<sup>16</sup> See *IN RE: Exchange of Transit Traffic*, State of Iowa Department of Commerce Utilities Board, Docket No. SPU-00-7 TF-00-275, Order Denying Application for Rehearing, May 3, 2002, at p. 4.

Section 86-803(15) of Nebraska Statute prohibits the Nebraska Commission from adopting a rule mandating bill and keep.

Section 86-803(15) of Nebraska Statute states that the Commission shall not mandate any arrangement that requires interconnecting telecommunications companies to engage in mutual recovery of costs through offsetting of reciprocal obligations, i.e. bill and keep. Thus, mandating bill and keep would not only be inconsistent with Nebraska Statute, but would be inconsistent with the IUB's decision regarding payment to Iowa Network services for the transport services it provides to the wireless providers.

**VII. The CMRS Petitioners Claim That The LECs Will Have No Incentive To Negotiate If The Tariffs Are Allowed To Go Into Effect Is Without Merit.**

According to the CMRS petitioners, an ILEC with a wireless termination tariff in effect has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider.<sup>17</sup>

The tariffs filed by the Nebraska Companies have a provision that the tariffs apply except if there is an interconnection agreement between the CMRS provider and the telephone company approved by the NPSC pursuant to the Act. Presumably, if there are aspects of these tariffs that the CMRS providers do not like, they will take advantage of the provisions of the Act. That is, they can request to negotiate with **an** ILEC. The ILECs and the CMRS providers then have the duty to negotiate in good faith in accordance with Section 252 of the Act. If there are issues left unresolved, either party to the negotiations may petition the state commission to arbitrate any open issue. Therefore, a tariff approved by the NPSC applies only until such time **as** a CMRS provider invokes its rights under the Act by requesting to negotiate an agreement with an ILEC and the

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NPSC has approved the agreement. The tariff filed by the Nebraska Companies does not pre-empt that right or process.

#### **VIII. ILECs Cannot File A Rate In the Tariff On Behalf Of A Wireless Carrier.**

The CMRS petitioners state that the tariffs are entirely one-sided, demanding that CMRS carriers pay reciprocal compensation but not agreeing to pay such compensation to CMRS providers.” Yet, two of the CMRS Petitioners stated in testimony before the NPSC that CMRS carriers are not subject to rate regulation by state commissions and are therefore foreclosed from filing tariffs to establish their rates for the transport and termination of traffic.” Thus, according to the CMRS Petitioners testimony, it would not be lawful to include a rate for traffic terminating to the wireless carriers in a tariff for terminating service provided by the Nebraska Companies. The tariff filed by the Nebraska Companies does not establish a rate for the wireless carriers and is therefore consistent with the CMRS Carriers’ own testimony.

#### **IX. ILECs Route Traffic To Interexchange Carriers To Fulfill Their Section 251(b)(3) Dialing Parity Requirements.**

The CMRS Petitioners state that they expect small ILECs to negotiate reciprocal compensation arrangements when calls are terminated to the CMRS Petitioners by an interexchange carrier (“IXC”) because the CMRS Petitioners are currently not receiving compensation for these calls from IXCs.<sup>20</sup> The CMRS Petitioners state that the Commission may need to address this issue if it is not resolved through negotiation,

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<sup>17</sup> See *Petition* at p. ii

<sup>18</sup> *Id.* at p. ii.

<sup>19</sup> See *The Commission, on its own Motion, Seeking to Investigate Telecommunications Companies’ Terms, Conditions, and Rates for the Provision of Wireless Termination Service*, Application No. C-2738/PI-58, Testimony of Gene DeJordy on Behalf of the CMRS Carriers (AT&T Wireless Services, Inc., VoiceStream Wireless Corporation, and Western Wireless Corp.), July 23, 2002, at p. 13.

arbitration, or other means of dispute resolution.<sup>21</sup> The Act, as well as past Commission Orders, have addressed this issue. As explained more fully below, the CMRS Petitioners' expectation that the small ILECs must "negotiate" to establish compensation for such calls is in contravention of the Commission's findings regarding such traffic.

LECs are subject to dialing parity and equal access requirements established in the Act. Pursuant to § 251(b)(3) of the Act, LECs have "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service . . . ." The FCC has implemented this mandate in 47 C.F.R. §§ 51.205 and 51.209. Section 251(g) of the Act preserves "the same equal access and nondiscriminatory interconnection restrictions and obligations (including the receipt of compensation). . . ,” as existed prior to the Act. The Nebraska Companies routed wireless calls terminating outside of their local exchanges to IXC's on a one plus basis prior to the Act. Access charges were assessed to IXC's for these originating calls. These calls continue to be routed in the same manner today and IXC's continue to be assessed access charges for such calls. A landline originated call subject to access charges prior to the Act continues to be subject to access charges under the Act and nothing in the Act has changed that treatment.

In the Commission's first *Local Competition Order*, there was no discussion of removing interexchange carriers from carrying calls by eliminating one plus dialing on calls to wireless carriers within the MTA. The *Local Competition Order* states that, "Access charges were developed to address a situation where three carriers collaborate to complete a call. . . . By contrast, reciprocal compensation is intended for a situation

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<sup>20</sup> See *Petition* at p.4.

<sup>21</sup> Id. at pp 3-4., footnote 8.

where two carriers collaborate to complete a call.”<sup>22</sup> The majority of the calls between the Nebraska Companies and CMRS providers are placed in situations requiring three carriers to complete the call. Therefore, access charges should apply to most calls originating on landlines and terminating on wireless carriers.

In paragraph 1043 of the same Order, the Commission defined a CMRS local service area as traffic that originates and terminates within the same MTA for the purposes of reciprocal compensation between two carriers only. This paragraph is often quoted partially by CMRS carriers to support their assertion that the Commission compels a conclusion that CMRS carriers are entitled to reciprocal compensation from the LECs for all traffic terminated on their networks, even when the traffic is delivered to them from an IXC. A complete reading this paragraph confirms that not all intraMTA CMRS traffic is subject to reciprocal compensation between a LEC and a CMRS provider.

As noted above, CMRS providers’ license areas are established under federal rules, and in many cases are larger than the local exchange areas that state commissions have established for incumbent LECs’ local service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the party’s locations at the beginning of the call) is subject to transport and termination rates under Section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interexchange service provided by CMRS carriers, such as some ‘roaming’ traffic that transits incumbent LECs’ switching facilities, which is subject to interstate access charges. Based on our authority under Section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and

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<sup>22</sup> *Local Competition Order* at paragraph 1034

are accessed such charges for traffic that is currently subject to interstate access charges.<sup>23</sup> (emphasis supplied)

At the time the *Local Competition Order* was written, there was very little existing LEC to CMRS traffic that was not carried by an IXC. Thus, CMRS carriers should be pursuing compensation from IXCs for this one plus dialed traffic. The Commission's finding in the *Declaratory Ruling on CMRS Access Charges* confirms this. The Commission found that "IXCs and CMRS carriers remain free to negotiate the rates, terms, and conditions under which they will exchange traffic. Given the mutual benefit that CMRS and IXC customers realize when CMRS carriers terminate calls from IXCs, we anticipate that these negotiations will be conducted in good faith and prove fruitful for both sets of carriers."<sup>24</sup>

## **X. Conclusion**

The Commission should deny the CMRS Petitioners' request to ". . . enter an order directing ILECs to withdraw any wireless termination tariffs in existence today, or alternatively, to declare such tariff unlawful, void and of no effect."<sup>25</sup> The CMRS Petitioners argued that small LECs are attempting to use wireless termination tariffs instead of negotiating interconnection agreements. However, as the Nebraska Companies have demonstrated, the language of the Act, and the Commission's interpretation of the Act, limits ILECs to receiving requests to negotiate with CMRS providers—ILECs have no statutory authority to compel CMRS providers into negotiations. Furthermore, the

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<sup>23</sup> Id., at **paragraph 1043**

<sup>24</sup> *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316 (rel. July 3, 2002) at p. 10.

<sup>25</sup> *See Petition* at p. 2.




Nebraska Companies are not attempting to use wireless termination tariffs to preempt CMRS providers' right to negotiate, or to obtain more favorable rates, terms and conditions than would be achieved through negotiations. The wireless termination tariffs filed by the Nebraska Companies contain an express provision which states that the tariff applies except as otherwise provided in **an** interconnection agreement between a CMRS provider and the telephone company approved by the NPSC pursuant to the Act.

The Commission should not take any action against wireless termination tariffs. These tariffs merely allow compensation to be received in cases where negotiations cannot be compelled to take place, but do not in any manner circumvent the possibility of negotiations initiated by CMRS providers, or override terms of interconnection agreements. Small, rural LECs such as the Nebraska Companies have been terminating for free the traffic of CMRS carriers with no reasonable recourse. This CMRS rural gravy train must cease—the tariffs are a lawful means of accomplishing exactly that.

Dated this 17th day of October, 2002.

NEBRASKA RURAL INDEPENDENT  
COMPANIES, COMMENTERS,

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